

No. PD-1044-19

IN THE  
COURT OF CRIMINAL APPEALS OF TEXAS  
AT AUSTIN, TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
7/1/2020  
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**THE STATE OF TEXAS,**  
**Petitioner**

**vs.**

**RICKY MORENO,**  
**Respondent**

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From the Court of Appeals for the  
Fifth District of Texas at Dallas  
In Cause Number 05-18-00271-CR

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**MOTION FOR REHEARING**

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On June 17, 2020, this Court vacated the Fifth Court of Appeals’ opinion reversing Respondent Ricky Moreno’s conviction on the ground that the trial court erred in excluding evidence of PTSD for the affirmative defense of duress. *Moreno v. State*, No. PD-1044-19, 2020 WL 3265252 (Tex. Crim. App. June 17, 2020). The Court based its decision to vacate on several premises. It distinguished federal case law upholding the admission of trauma evidence in the context of duress on the ground that, under federal case law, the defense of duress is a defense at common-law and courts presumably have greater leeway to interpret a defendant’s reasonableness under common law. It distinguished Texas’ duress statute from other states’ because it does not include the additional phrase “in his situation” or similar language that, in other states, opens the door to PTSD evidence. And it noted that Respondent’s fact scenario differed from scenarios in which other states’ courts admitted trauma evidence, specifically when the threatening party is the same person who caused the underlying trauma. *Id.* at \*5-7. The Court expressly noted that it was not passing on whether trauma evidence would be admissible in Texas if the source of duress was the same person who caused the underlying trauma, although there is no statutory or common-law vehicle for giving effect to relationship evidence in the context of duress for most offenses. *Id.*; *but see* Tex. Code Crim. Proc. art. 38.36 (murder). Respondent asks this Court to grant rehearing and reconsider his position that, in the context of duress, any assessment of the reasonableness of a defendant’s

actions must take into account the defendant's particular circumstances, at least to a certain extent. Knowledge of the circumstances under which an alleged crime was committed is essential to a jury's determination of whether a defendant's actions were reasonable. *See U.S. v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016). By its opinion, the Court has effectively and categorically excluded any evidence of past experiences that caused PTSD and an interpretation and application of PTSD in the context of duress.

Respondent acknowledges that, to be admissible, trauma evidence must consist of a gross and identifiable class of circumstances. PTSD is a class with commonly identifiable symptoms, like Battered Woman's Syndrome that, if relevant, must be considered among the particular circumstances that inform the reasonableness of a defendant's actions. *See U.S. v. Dixon*, 901 F.3d 1170, 1182-83 (10th Cir. 2018) (noting that in context of pattern jury instruction for duress, the instruction's focus is on the perceptions and actions of the defendant, not on a hypothetically reasonable person: "certain specific circumstances confronting that particular defendant may influence the factfinder's evaluation of whether her conduct is reasonable"). It is Respondent's position that the trauma evidence before the Court consists of a gross, identifiable class of symptoms, and the specific relevant evidence would be limited to the underlying traumatic event and expert interpretation and application of PTSD to the offense on trial.

Respondent further argues that the admission of particular circumstances does not transform the inquiry. Considering the subject's particular circumstances will not transform the reasonableness calculation from an objective inquiry into a subjective inquiry or replace the reasonable person standard with a reasonable traumatized-person standard. In fact, knowledge of the circumstances under which the defendant committed the alleged crimes is essential to the jury's determination of whether the defendant's actions were reasonable. In *U.S. v. Marengi*, the Maine federal district court held that because the distinction between subjective and objective evidence is often unclear, courts should be wary to erect per se bars against trauma evidence in the context of duress. 893 F.Supp. 85, 94-95 (D. Me. 1995). The court articulated graphically the complexity of distinguishing between subjective and objective evidence:

This can be demonstrated by changing the "snapshot" of circumstances that is shown to a jury in any particular case. If the jury sees the defendant's circumstances immediately prior to commission of the crime and there is no gun held to her head or other markedly extreme duress, the jury may conclude that any fear of imminent death or violence was unreasonable. However, if the defendant is permitted to pull the camera back to provide the broader picture of her circumstances, the jury could learn of a pattern of violence, control, and coercion leading up to the criminal act. [Footnotes omitted].

*Id.* "The jury must consider [a] defendant's *situation and knowledge*, which makes the evidence relevant, but the ultimate question is whether a reasonable *person*, not a reasonable battered or traumatized person, would believe in the need to kill to

prevent imminent harm.” *Id.* (first emphasis added). As with self-defense, an assessment of “objective reasonableness” for duress “must view the situation from the defendant’s perspective.” *Id.*; *People v. Humphrey*, 13 Cal. 4th 1073, 1086, 921 P.2d 1, 8 (1996) (emphasis in original).

Examination of the particulars of the duress defense shows that expert testimony on battered woman syndrome, for instance, can identify relevant aspects of a battered woman’s particular circumstances, like hypervigilance to cues of impending danger. *Nwoye*, 824 F.3d at 1137. It is also compatible with assessing whether a defendant had a reasonable opportunity to escape from the coercing party. It is precisely because a jury would not understand why a defendant would remain in the environment that the expert testimony would aid a jury in evaluating the case. Such testimony does not seek to alter the duress defense’s reasonable-person standard. The question is still whether or not “a person of reasonable firmness would have been unable to resist.” The proper inquiry for a jury considering battered woman’s syndrome is whether a reasonable person subjected to the same threats and pattern of abuse would have believed he or she was compelled to engage in the same illegal conduct. *State v. Richter*, 424 P.3d 402, 408 (Ariz. 2018).

This is also the proper inquiry for PTSD. The defendant must have acted under the influence of a *reasonable* fear of imminent death or serious bodily harm at the

time of the alleged crime. *See* 2 Wayne R. LaFare, Substantive Criminal Law § 9.7(b) (2d ed. 2003) (“the danger need not be real; it is enough if the defendant reasonably believes it to be real”); *see also* *U.S. v. Jenrette*, 744 F.2d 817, 820–21 (D.C. Cir. 1984). “In determining if the fear was ‘well-grounded,’ the [duress] defense does permit the fact-finder to take into account the objective situation in which the defendant was allegedly subjected to duress. Fear which would be irrational in one set of circumstances may be well-grounded if the experience of the defendant is such that the defendant can reasonably anticipate being harmed on failure to comply.” *U.S. v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992), *op. supplemented on denial of reh'g sub nom.*

Thus, whether expert testimony on any syndrome is relevant to the duress defense turns on whether such testimony can identify any aspects of the defendant’s “particular circumstances” that can help the jury assess the reasonableness of his actions. Testimony on PTSD can illuminate relevant aspects of the circumstances of a person suffering from PTSD, including in this case how a victim of a prior attack resembling the scenario a violent offender is threatening would believe the threat. *Moreno*, 586 S.W.3d at 496 (holding that testimony regarding violent home invasion and expert testimony regarding diagnosis of PTSD “could indeed have identified relevant and probative aspects of [Respondent’s] particular circumstances”).

In Respondent's case, Detective Yeric would have testified to the event precipitating the diagnosis of PTSD: Just after midnight, a mere four years before the instant offense, seven people entered Respondent's family home on Ezekial. Respondent lived there with his mother, father, and niece. Respondent's father was shot in the chest with a shotgun and killed. Respondent's niece was attacked in her bedroom, hit repeatedly in the head with a flashlight, and stabbed in the stomach. His mother was also beaten inside the house, and Respondent was beaten on the front porch. Respondent's father was the family breadwinner—he maintained a job and paid the bills. (RR9:116-125, 168-70).

Psychiatrists Lisa Clayton (RR7:138-153) and Michael Pittman (RR7:120-136) would have testified that Respondent suffered from PTSD based on the 2012 home-invasion/murder. Dr. Clayton testified—outside of the jury's presence—to the reasoning behind her diagnosis of PTSD. Specifically, she testified that Respondent met Criterion A (witnessing a traumatic event) when he was both witness to and victim of a traumatic event in which multiple family members, including himself, were assaulted and killed. (RR7:148). He met Criterion B (manifesting intrusive symptoms) when he reported intrusive thoughts and nightmares related to the 2012 murder and expressed intense distress when he was talking about the murder. (RR7:149). He met Criterion C (persistent, effortful avoidance of distressing trauma or related stimuli) by avoiding family outings and thoughts and feelings of guilt over

his father's death and increasing his drug use. (RR7:149). He met Criterion D (negative alteration in cognition and mood that began or worsened after the traumatic event) by demonstrating persistent negative beliefs and expectations of the world—that the world is a dangerous place. (RR7:149-50). He worried obsessively about his mother's health and her life and that she would suffer harm in the neighborhood in which they lived. *Id.* He demonstrated persistent distortions and self-blame and manifested extreme guilt feelings. *Id.* He believed that if had not have been smoking on the front stoop at the time of the home invasion, the people who attacked and murdered his father would not have been able to enter the house. *Id.* He believed he should have done more to fight them off and that he was to blame for his father's death. *Id.* He experienced persistent, trauma-related emotion and diminished interest in significant activities. *Id.* He became isolated, quit engaging in family activities, and experienced feelings of alienation. *Id.* He also met Criterion E (trauma-related alterations and arousal in reactivity): He became more irritable with family members, self-destructive, hyper-vigilant, and reactionary to noises and threats from others. (RR7:150-51).

In sum, the psychiatrists testified outside of the jury's presence that Respondent's diagnosis of PTSD, based on the 2012 home-invasion/murder, would have affected his actions in the current case in the following manners:

1. He exhibited extreme fear for something happening to his mother. He feared Armijo would kill him and then his mother. It affected his perception of the danger that Armijo posed to him and his family, specifically the danger he posed to Respondent's mother.

2. He displayed a "learned helplessness," and he "froze." He felt terrorized and in shock. He did not feel he could get away safely and not have Armijo come back and kill his mother. Respondent felt powerless to confront Armijo when the event was happening.

3. He saw Armijo as being extremely powerful. In effect, Respondent argues that he was so far in thrall to Armijo that a legal sanction would be ineffective in controlling his choices.

4. His loss of a parent to a violent offense magnified his feelings. Because he lost his father to a violent crime, he had an irrational belief that Armijo would kill his mother. He had to do everything in order to protect his mother.

5. When Respondent left the premises and did not immediately seek help from police, this was a response to PTSD. He felt that Armijo could come back and harm him and kill his mother if he did.

(RR7:152-153).

The particular circumstances of the relevant underlying traumatic event coupled with the experts' diagnosis of PTSD and interpretation and application of his diagnosis would have supplemented the circumstances surrounding the offense that informed the reasonableness of his actions. The salient circumstances surrounding the offense included that Respondent repeatedly indicated that he was afraid of Armijo; he cried multiple times during his police interviews, particularly when police showed him a picture of Armijo in the line-up. (SX 73, 76). Armijo directly threatened Respondent during the course of the offense by pointing a

handgun and an AR-15 semi-automatic rifle at Respondent. *Id.* He also threatened to kill Respondent, his family, and the victim's family while giving Respondent orders. (RR7:50, 110). Respondent witnessed Gutierrez's and Villanueva's torture. (*Passim*). The threats were imminent: Armijo had available—and was actively wielding—2 semi-automatic handguns, a baseball bat, a 2x6, 2 knives, and an AR-15 assault rifle. (SX 73, 76; RR6:69, 128, 138-39). Further, Armijo knew where Respondent and his mother lived; their house was only two blocks from the site of the offense. (RR7:26). Respondent accordingly first retrieved his mother from her home in the neighborhood and removed her to a location outside of the neighborhood before calling 911. (SX 73, RR7:51).

The particular circumstances of the offense coupled with the particular circumstances of Respondent's PTSD diagnosis would have painted a complete picture of Respondent's defense of duress. It is Respondent's position that his particular circumstances mattered in this case. PTSD is an identifiable class of circumstances, like battered woman's syndrome, and a recognized area in which an expert can opine on how it affects a reasonable person. Without expert testimony, the jury in this case was unable to interpret the evidence surrounding Respondent's defense; PTSD colored everything Respondent did.

The proper inquiry for a jury considering PTSD is whether a reasonable person subjected to the same threats and abuse would have believed he or she was

compelled to engage in the same illegal conduct. The proffered evidence of PTSD, emanating from the 2012 home-invasion/murder, linked specifically to threats that Armijo made to kill Respondent and his family and to Respondent's knowledge of Armijo's violent reputation. It was therefore relevant to whether a person of reasonable firmness believed Armijo would execute his threats and probative to the jury's evaluation of whether Respondent acted under duress during the course of the offense. The statutory modifier of "in his situation" or "in his particular circumstances" would not have more likely included PTSD in the reasonableness calculation than the current, more general statute. Respondent's decision to comply with Armijo's directives was a decision based on reasonable firmness because that standard cannot exist in a vacuum. The trial court erred in excluding PTSD from the jury's consideration. Respondent asks that this Court grant Respondent's motion for rehearing and ultimately affirm the court of appeals' reversal of the trial court's decision.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Court vacate its decision, affirm the court of appeals' decision under any harm standard, and grant any such other relief to which he may be justly entitled.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of July, 2020, a true copy of the foregoing petition was served by electronic delivery to the Dallas County Criminal District Attorney's Office at [DCDAAppeals@dallascounty.org](mailto:DCDAAppeals@dallascounty.org) and Stacey M. Soule, State Prosecuting Attorney, at [Stacey.Soule@spa.texas.gov](mailto:Stacey.Soule@spa.texas.gov).



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Christi Dean

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the word count in this document, which is prepared in Microsoft Word 2010, is 2,608.



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Christi Dean

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